92-1431

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

EDWARD MATHEWS, BEARL MATHEWS,
NEHEMIA MATHEWS, NATHAN MATHEWS AND
JAMES MATHEWS

Petitioners

VS.

HARRIS METHODIST, FORT WORTH, A
NON-PROFIT CORPORATION;
TARRANT-PARKER COUNTY MEDICAL EXAMINERS
DISTRICT; AND LIONS ORGAN AND EYE BANK,
DISTRICT 2E2, INC., A TEXAS
CORPORATION

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

LAURANCE L. PRIDDY
PRIDDY & CHOVANEC
301 Commerce Street
Suite 1210
Fort Worth, Texas 76102
817-877-1671
ATTORNEYS FOR
RESPONDENTS

Februrary 24, 1993

QUESTIONS PRESENTED

1. Does this court's decision in Peralta v. Heights Medical Center, Inc., 485 U.S. 80 (1988), holding that default judgments taken without notice violate the due process clause of the 14th Amendment to the United States Constitution, apply with equal force to invalidate as unconstitutionally impermissible dismissals of causes of action without notice to the parties at a time when the running of the statute of limitations prevents refiling?

2. Did dismissal of the Petitioners' cause of action without notice to them at a time when the statue of limitations had run so as to prevent refiling deprive the Petitioners of due process of law as guaranteed by the 14th Amendment to the United States Constitution?

3. Do the procedures provided by

Rules 165a and 306a of the Texas Rules of Civil Procedure violate due process of law as guaranteed by the 14th Amendment to the United States Constitution by permitting dismissal of causes of action without notice to the parties after the statute of limitations has run so as to prevent refiling?

LIST OF PARTIES

Petitioners

Edward Mathews;
Bearl Mathews;
Nehemia Mathews;
Nathan Mathews; and
James Mathews

Respondents

Harris Methodist, Fort Worth, A Non
-Profit Corporation;
Tarrant-Parker County Medical Examiners
District; and
Lions Organ and Eye Bank, District
2E2, Inc., A Texas Corporation

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REASONS FOR GRANTING THE WRIT:

I. The refusal of the Texas Court of Appeals and the Texas Supreme Court to reinstate Petitioners' cause of action after its dismissal without notice to Petitioners at a time when the applicable statute of limitations prevented refiling deprived the Petitioners of due process of law under the 14th Amendment to the United States Constitution, and is in conflict with this court's opinion in Peralta v. Heights Medical Center, Inc., 485 U.S. 80, 99 L.Ed.2d 75 108 S.Ct., 896 (1988). 17

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II. The procedure established for notification of dismissal for lack of prosecution under Rule 165a, Texas Rules of Civil Procedure and Rule 306a, Texas Rules of Civil Procedure, providing that time periods for appeal run on dismissals even where there has been no notice of the dismissal, are violative of due process of law as guaranteed by the 14th Amendment to the United States Constitution. 17-18

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

NO._____

EDWARD MATHEWS, BEARL MATHEWS,
NEHEMIA MATHEWS, NATHAN MATHEWS AND
JAMES MATHEWS
Petitioners

VS.

HARRIS METHODIST, FORT WORTH, A
NON-PROFIT CORPORATION;
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DISTRICT; AND LIONS ORGAN AND EYE BANK,
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Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF TEXAS

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners herein pray that a Writ of Certiorari issue to the Supreme Court of the State of Texas to review that court's

order of December 2, 1992, overruling Petitioners' Motion for Rehearing, and also to review the Texas Supreme Court's earlier denial of writ, and the opinion of the Court of Appeals for the Second Court of Appeals for the Second Court of Appeals District of Texas of July 22, 1992.

OPINIONS BELOW

The order of the Texas Supreme Court overruling Petitioners' Motion for Rehearing in this cause is reproduced in the Appendix at page A-1. The order of the Texas Supreme Court denying Petitioners' Application for Writ of Error is reproduced at page A-2 of the Appendix. These orders are not reported.

The judgment and opinion of the Texas Court of Appeals for the Second Court of Appeals District of Texas are reproduced at pages A-3 and A-4 of the Appendix. It is reported as Mathews v. Harris Methodist, Fort Worth, 834 S.W.2d 582 (Tex.App.-Fort Worth, 1992, writ denied).

JURISDICTION

The Court of Appeals for the Second Court of Appeals District of Texas issued its judgment and opinion on July 22,

1992.[1] The Texas Supreme Court declined to review the Court of Appeals' opinion through the granting of writ of error by an unpublished order dated November 4, 1992.[2] The Texas Supreme Court overruled Petitioners' Motion for Rehearing by unpublished order dated December 2, 1992.[3] Jurisdiction is conferred on this court by 28 U.S.C. Section 1254(1), since this petition is being filed within ninety (90) days of the final order of the Texas Supreme Court, as provided by Sup. Ct. R. 13.4.

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[1] Appendix, pages A-3 and A-4

[2] Appendix, page A-2

[3] Appendix, page A-1

STATUTES AND RULES INVOLVED

Rule 165a of the Texas Rules of Civil Procedure provides as follows:

> 1. **Failure to Appear.** A case may be dismissed for want of prosecution on failure of any party seeking affirmative relief to appear for any hearing or trial of which the party had notice. Notice of the court's intention to dismiss and the date and place of the dismissal hearing shall be sent by the clerk to each attorney of record, and to each party not represented by an attorney and whose address is shown on the docket or in the papers on file, by posting same in the United States Postal Service. At the dismissal hearing, the court shall dismiss for want of prosecution unless there is good cause for the case to be maintained on the docket. If the court determines to maintain the case on the docket, it shall render a pretrial order assigning a trial date for the case and setting deadlines for the joining of new parties, all discovery, filing of all pleadings, the making of a response or supplemental responses to discovery and other pretrial matters. The case may be continued

thereafter only for valid and compelling reasons specifically determined by court order. Notice of the signing of the order of dismissal shall be given as provided in Rule 306a. Failure to mail notices as required by this rule shall not affect any of the periods mentioned in Rule 306a except as provided in that rule.

2. **Non-Compliance With Time Standards.** Any case not disposed of within time standards promulgated by the Supreme Court under its Administrative Rules may be placed on a dismissal docket.

3. **Reinstatement.** A motion to reinstate shall set forth the grounds therefor and be verified by the movant or his attorney. It shall be filed with the clerk within 30 days after the order of dismissal is signed or within the period provided by Rule 306a. A copy of the motion to reinstate shall be served on each attorney of record and each party not represented by an attorney whose address is shown on the docket or in the papers on file. The clerk shall deliver a copy of the motion to the judge, who shall set a hearing on the motion as soon as practicable. The court shall notify all parties or

their attorneys of record of the date, time and place of the hearing.

The court shall reinstate the case upon finding after a hearing that the failure of the party or his attorney was not intentional or the result of conscious indifference but was due to an accident or mistake or that the failure has been otherwise reasonably explained.

In the event for any reason a motion for reinstatement is not decided by signed written order within seventy-five days after the judgment is signed, or, within such other time as may be allowed by Rule 306a, the motion shall be deemed overruled by operation of law. If a motion to reinstate is timely filed by any party, the trial court, regardless of whether an appeal has been perfected, has plenary power to reinstate the case until 30 days after all such timely filed motions are overruled, either by a written and signed order or by operation of law, whichever occurs first.

4. **Cumulative Remedies.** This dismissal and reinstatement procedure shall be cumulative of the rules and laws governing any other procedures available to the parties in such cases. The same reinstatement

> procedures and timetable are applicable to all dismissals for want of prosecution including cases which are dismissed pursuant to the court's inherent power, whether or not a motion to dismiss has been filed.

Rule 306a of the Texas Rules of Civil Procedure provides as follows:

> 1. **Beginning of Periods.** The date of judgment or order is signed as shown of record shall determine the beginning of periods prescribed by these rules for the court's plenary power to grant a new trial or to vacate, modify, correct or reform a judgment or order and for filing in the trial court the various documents that these rules authorize a party to file within such periods including, but not limited to, motions for new trial, motions to modify judgments, motions to reinstate a case dismissed for want of prosecution, motions to vacate judgment and requests for findings of fact and conclusions of law; but this rule shall not determine what constitutes rendition of a judgment or order for any other purpose.
>
> 2. **Date to be Shown.** Judges, attorneys and clerks are

directed to use their best efforts to cause all judgments, decisions and orders of any kind to be reduced to writing and signed by the trial judge with the date of signing stated therein. If the date of signing is not recited in the judgment or order it may be shown in the record by a certificate of the judge or otherwise; provided, however, that the absence of a showing of the date in the record shall not invalidate any judgment or order.

3. **Notice of Judgment.** When the final judgment or other appealable order is signed, the clerk of the court shall immediately give notice to the parties or their attorneys of record by first-class mail advising that the judgment or order was signed. Failure to comply with the provisions of this rule shall not affect the periods mentioned in paragraph (1) of this rule, except as provided in paragraph (4).

4. **No Notice of Judgment.** If within twenty days after the judgment or other appealable order is signed, a party adversely affected by it or his attorney has neither received the notice required by paragraph (3) of this rule nor acquired actual knowledge of

the order, then with respect to that party all the periods mentioned in paragraph (1) shall begin on the date that such party or his attorney received such notice or acquired actual knowledge of the signing, whichever occurred first, but in no event shall such periods begin more than ninety days after the original judgment or other appealable order was signed.

5. **Motion, Notice and Hearing.** In order to establish the application of paragraph (4) of this rule, the party adversely affected is required to prove in the trial court, on sworn motion and notice, the date on which the party or his attorney first either received a notice of the judgment or acquired actual knowledge of the signing and that this date was more than twenty days after the judgment was signed.

6. **Nunc Pro Tunc Order.** When a corrected judgment has been signed after expiration of the court's plenary power pursuant to Rule 316, the periods mentioned in paragraph (1) of this rule shall run from the date of signing the corrected judgment with respect to any complaint that would not be applicable to the original document.

> 7. **When Process Served by Publication.** With respect to a motion for new trial filed more than thirty days after the judgment was signed pursuant to Rule 329 when process has been served by publication, the periods provided by paragraph (1) shall be computed as if the judgment were signed on the date of filing the motion.

Rule 329b of the Texas Rules of Civil Procedure provides in pertinent part as follows:

> (f) On expiration of the time within which the trial court has plenary power, a judgment cannot be set aside by the trial court except by bill of review for sufficient cause, filed within the time allowed by law; provided that the court may at any time correct a clerical error in the record of a judgment and render judgment nunc pro tunc under Rule 316, and may also sign an order declaring a previous judgment or order to be void because signed after the court's plenary power had expired.

Section 16.003, Vernon's Texas Civil Practices and Remedies Code, provides as follows:

(a) A person must bring suit for trespass for injury to the estate or to the property of another, conversion of personal property, taking or detaining the personal property of another, personal injury, forcible entry and detainer, and forcible detainer not later than two years after the day the cause of action accrues.

(b) A person must bring suit not later than two years after the day the cause of action accrues in an action for injury resulting in death. The cause of action accrues on the death of the injured person.

STATEMENT OF THE CASE

On December 6, 1987, the Petitioners' brother, Phillip Andrew Mathews, was seriously injured in a car wreck and subsequently died in Harris Hospital, Fort Worth. Without the consent of the Petitioners as next of kin, employees or agents of one, some or all of the Respondents removed the corneas from the decedent's eyes.[4]

Petitioners sued the Respondents on several theories of liability in Cause No. 153-122176-89, filed August 7, 1989, in the 153rd District Court of Tarrant County, Texas. On September 28, 1990, the District Court dismissed the cause for lack of prosecution without actual notice to Petitioners or their attorney.

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[4] These facts are alleged in Plaintiffs' Original Petition which is part of the original record in the Texas courts.

In March of 1991, the Petitioners learned for the first time that their case had been dismissed. They filed an equitable bill of review on March 28, 1991, seeking reinstatement on the basis that they had no notice of the dismissal. Edmund Brown, the Petitioners' attorney at the time of dismissal, testified at the bill of review hearing that he had no notice of the dismissal.

No evidence was introduced showing that the Petitioners or their attorney had any notice of the dismissal until March of 1991, other than the fact that the cause had been posted on a dismissal docket. Dismissal under these circumstances was tantamount to final disposition of the case, since the two year Texas statute of limitations had run by the time Petitioners learned of the

dismissal.[5] The event made the basis of the litigation occurred on December 6, 1987.

The trial court denied Petitioners' bill of review by order dated September 13, 1991. Petitioners perfected appeal to the Court of Appeals for the Second Court of Appeals District of Texas, which affirmed the trial court's denial of the bill of review by opinion and order dated July 22, 1992, in Mathews v. Harris Methodist Fort Worth, 834 S.W.2d 582 (Tex.App.-Fort Worth, 1992, writ denied).[6]

The Petitioners raised the constitutionality of the dismissal of their case under the due process clause

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[5] See Section 16.003, Vernon's Texas Civil Practices and Remedies Code, pages 11 and 12.

[6] Appendix, page A-4

of the Fourteenth Amendment to the United States Constitution both as grounds for relief in their bill of review in the trial court, and as a point of error in the Texas Court of Appeals for the Second Court of Appeals District of Texas. The Court of Appeals addressed this point in its opinion.[7]

The Petitioners petitioned the Texas Supreme Court for writ of error. The Texas Supreme Court denied the application by unpublished order dated November 4, 1992,[8] and overruled Petitioners' motion for rehearing by unpublished order December 2, 1992.[9] The order of the Texas Supreme Court overruling Petitioners' Motion for

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[7] Mathews v. Harris Methodist, Appendix, pages A-11 and A-12

[8] Appendix, page A-2

[9] Appendix, page A-1

Rehearing represents the final appellate step available to Petitioners through the Texas courts. This petition for writ of certiorari is presented within ninety days of the final action of the Texas Supreme Court.

REASONS FOR GRANTING THE WRIT

I. The refusal of the Texas Court of Appeals and the Texas Supreme Court to reinstate Petitioners' cause of action after its dismissal without notice to Petitioners at a time when the applicable statute of limitations prevented refiling deprived the Petitioners of due process of law under the 14th Amendment to the United States Constitution, and is in conflict with this court's opinion in Peralta v. Heights Medical Center, Inc., 485 U.S. 80, 99 L.Ed.2d 75, 108 S.Ct., 896 (1988).

II. The procedure established for notification of dismissal for lack of prosecution under Rule 165a, Texas Rules of Civil Procedure and Rule 306a, Texas Rules of Civil Procedure, providing that time periods for

> appeal run on dismissals even where there has been no notice of the dismissal, are violative of due process of law as guaranteed by the 14th Amendment to the United States Constitution.

Rule 165a of the Texas Rules of Civil Procedure establishes the procedure for dismissal for want of prosecution in Texas.[10] It provides that notice of dismissal is to be sent to the attorneys, but fails to provide any procedure for verification that notice has been received. It further provides that failure to mail the notice does not affect the time periods set out in Rule 306a, Texas Rules of Civil Procedure.[11] Rule 306a provides that all applicable time periods begin to run when the judgment is signed.

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[10] Page 5

[11] Page 9

Rule 165a and Rule 306a provide motions to reinstate causes dismissed for want of prosecution may be filed until thirty days after the order of dismissal is signed.[12] Under Rule 306a, the running of the thirty day period is tolled for ninety days where the party has had no notice of dismissal.[13] In other words, in such cases, the judgment is final 120 days after it is signed, even if the parties have had no notice of the dismissal, and thereafter, review may only be had by bill of review.[14]

This cause of action was dismissed for want of prosecution without actual notice to the Petitioners or their attorney on

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[12] Rule 165a(3), Page 6

[13] Rule 306a(4), Page 9

[14] Rule 329b(f), Appendix, page 11

September 13, 1991.[15] The Petitioners did not learn of the dismissal until March, 1991, and therefore could not reinstate under Rules 165a and 306a, since the trial court's plenary power under those rules to reinstate had expired in January, 1991, 120 days after the dismissal was signed.

Accordingly, the Petitioners filed their bill of review pursuant to Rule 329b(f) on March 28, 1991. It was denied by the trial court and the denial was upheld by the Court of Appeals for the Second Court of Appeals District of Texas and by the Texas Supreme Court, as previously noted.

The evidence in this case clearly demonstrates that neither the Petitioners nor their attorney, Brown, had actual

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[15] Court of Appeals opinion, Mathews v. Harris Methodist, Appendix, page A-4

notice of the dismissal of their cause of action until after the plenary jurisdiction of the trial court to reinstate the cause had expired. None of the court documentation documenting the dismissal of the cause of action shows that actual notice was ever accomplished or even attempted. No evidence was elicited showing that any notice was ever even mailed to Petitioners counsel. Whether or not a notice was mailed, Petitioners' counsel, Edmund Brown, clearly and unequivocally testified that he did not receive the notice, even though when he moved his office to another location in Fort Worth, he continued to receive mail through a forwarding order with the post office.

Under these circumstances, since the statute of limitations has run on their claim, and had run on the claim by the

time they learned it had been dismissed, the Petitioners have forever lost any right to redress against the Respondents for the wrongful removal of the corneas from the eyes of their deceased brother, without having had actual notice that dismissal had occurred within time for reinstatement of the cause under the court's plenary jurisdiction. The record further does not demonstrate that notification to Petitioners of dismissal of this case was even attempted.

This court found fault with Texas' default procedure in permitting a default without actual notice to stand in Peralta v. Heights Medical Center, Inc., 485 U.S. 80, 99 L.Ed.2d 75, 108 S.Ct. 896 (1988).

This court held in part as follows:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonable calculated, under

> the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections" Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 94 L.Ed. 865, 70 S.Ct. 652 (1950).
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> "Failure to give notice violates the most rudimentary demands of due process of law." Armstrong v. Manzo, 380 U.S. 545, 550, 14 L.Ed.2d 62, 85 S.Ct. 1187 (1965). See also World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291, 62 L.Ed.2d 490, 100 S.Ct. 559 (1980); Mathews v. Eldridge, 424 U.S. 319, 333, 47 L.Ed.2d 18, 96 S.Ct. 893 (1976); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 110, 23 L.Ed.2d 129, 89 S.Ct. 1562 (1969); Pennoyer v. Neff, 95 U.S. 714, 733, 24 L.Ed. 565 (1878). Peralta, supra, at 99 L.Ed.2d 81.

While it is true that the Petitioners, having filed this cause of action through their attorney, knew it was pending, it is not reasonable to expect them to be continually aware of the status of the case even without any notice being given

to them. There should be no presumption that parties to litigation are aware of all activities involving the case, even without being notified. If there were such a presumption, it would not be necessary to send any notices to either counsel, since they would be presumed to know the status of all the court's activities even without being notified.

Petitioners' case cannot be distinguished from Peralta in that the procedures utilized by the Texas courts in permitting dismissal for want of prosecution without notice are just as invalid and constitutionally infirm as the default procedures spoken to by this court in Peralta.

In this regard, Petitioners note that Rule 165a of the Texas Rules of Civil Procedure, providing for dismissal for want of prosecution, provides that notice

of dismissal is to be given, but failure to mail the notice does not affect any of the time periods running under Rule 306a with regard to finality of the action.

Petitioners submit that permitting a dismissal under Rule 165a of the Texas Rules of Civil Procedure to become final through the operation of the time period set out in Rule 306a and Rule 165a without requiring that the parties affected have actual notice of the dismissal is unconstitutional, just like the default procedures addressed by this court Peralta.

The Texas Supreme Court has followed Peralta and acknowledged its effect as far as defaults are concerned in Lopez v. Lopez, 757 S.W.2d 721, 723 (Tex. 1988).

Petitioners raised the unconstitutionality of a final dismissal without notice under the principles

enunciated by this court in Peralta in the Texas Court of Appeals for the Second Court of Appeals District of Texas. The Court of Appeals attempted to distinguish Peralta in the following way:

> Likewise, we find that the cases cited for the proposition that appellants were deprived of their right to due process inapplicable. Peralta involved a defendant who had no service of process and had not submitted to the jurisdiction of the court; it is much more easily understood how that party was deprived of his right to due process as opposed to appellants who filed suit themselves, invoked the jurisdiction of the court and then failed to give that court notice of where they could be reached. The Lopez decision involved a defendant who was never notified of a trial setting and consequently, failed to appear. The gravity of the lack of notice in these cases is more readily apparent than in the present case. These decisions in Peralta and Lopez involve a complete lack of notice without fault of the party who did not receive notice. In the present case it cannot be said that appellants'

> attorney was without fault because he knew that he had a case pending yet failed to give the district court notice of his new address.[16]

While the Texas Court of Appeals recites that Brown, Petitioners' attorney, was "not without fault" regarding the dismissal, because he failed to give the district court notice of his new address, neither the Court of Appeals nor the trial court found that failure to send a change of address to the court had anything to do with Brown's failure to receive notice of dismissal. He testified that he did not receive notice, and his testimony was unchallenged. He also testified that he had sent a change of address notice to the post office, and continued to receive his mail through the change of address.

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[16] Mathews v. Harris Methodist, Appendix, pages A-11 and A-12

The record in the Texas courts does not contain any testimony that notice was mailed to Petitioners or their attorney at any address.

Considering the record, the court of appeals' attempt to distinguish Peralta is invalid. As in Peralta, parties to litigation have suffered a final disposition of their case without notice. In this sense, Peralta is fully in point and indistinguishable, and the decision of the Texas court upholding denial of relief conflicts directly with this court's opinion in Peralta.

Since the dismissal procedures utilized and upheld by the Texas courts are just as arbitrary and pernicious as the default procedures condemned by this court in Peralta, this court should grant this petition, reverse the action of the Texas Supreme Court, the Texas Court of

Appeals, and the Texas District Court, and order this case reinstated for trial.

CONCLUSION

For the foregoing reasons, Petitioners pray that a writ of certiorari issue to review the July 22, 1992 opinion of the Court of Appeals for the Second Court of Appeals District of Texas, the order of the Texas Supreme Court of November 4, 1992 denying writ of error and the order of the Texas Supreme Court of December 2, 1992 overruling Petitioners' Motion for Rehearing. Petitioners further pray that, upon granting of the petition, the actions of the Texas courts denying relief be reversed and this cause be remanded to the Texas courts for further

action.

Respectfully submitted,

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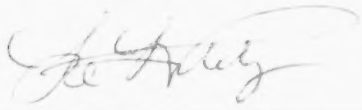

LAURANCE L. PRIDDY

ATTORNEYS FOR PETITIONERS

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

December 2, 1992

RE: Case No. D-2887

Style: EDWARD MATHEWS, BEARL MATHEWS, NEHEMIA (aka FRED) MATHEWS, NATHAN MATHEWS AND JAMES MATHEWS
v. HARRIS-METHODIST, FORT WORTH, A NON-PROFIT CORPORATION, TARRANT-PARKER COUNTY MEDICAL EXAMIN

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Respectfully yours,

JOHN T. ADAMS, CLERK

BY: /s/
Tencha Damian, Deputy

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

November 4, 1992

RE: Case No. D-2887

Style: EDWARD MATHEWS, BEARL MATHEWS, NEHEMIA (aka FRED) MATHEWS, NATHAN MATHEWS AND JAMES MATHEWS
v. HARRIS-METHODIST, FORT WORTH, A NON-PROFIT CORPORATION, TARRANT-PARKER COUNTY MEDICAL EXAMIN

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation, "Writ Denied."

Respectfully yours,

JOHN T. ADAMS, CLERK

BY: /s/
Tencha Damian, Deputy

NO. 2-91-272-CV

COURT OF APPEALS

SECOND COURT OF APPEALS DISTRICT OF TEXAS
FORT WORTH

JUDGMENT

This Court has considered the record on appeal in this case and is of the opinion that there was no error in the judgment of the trial court. It is ordered, adjudged and decreed that the trial court's judgment is affirmed.

It is further ordered that appellants, Edward Mathews, Bearl Mathews, Nehemiah (aka Fred) Mathews, Nathan Mathews and James Mathews, and their sureties, Laurance L. Priddy, and Edmund Brown, pay all costs of this appeal, for which let execution issue, and that this decision be certified below for observance.

/s/ David F. Farris
JUSTICE

AFFIRM.CVje

NO. 2-91-272--CV

COURT OF APPEALS

SECOND COURT OF APPEALS DISTRICT OF TEXAS

FORT WORTH

EDWARD MATHEWS, BEARL MATHEWS, NEHEMIAH (AKA FRED) MATHEWS, NATHAN MATHEWS, AND JAMES MATHEWS APPELLANTS

VS.

HARRIS METHODIST, FORT WORTH, A NON-PROFIT CORPORATION, TARRANT-PARKER COUNTY MEDICAL EXAMINER'S DISTRICT, AND LIONS ORGAN AND EYE BANK DISTRICT 2E2, INC., A TEXAS CORPORATION APPELLEES

- - - - - - -

FROM THE 153RD DISTRICT COURT OF TARRANT COUNTY

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OPINION

- - - - - - -

Edward Mathews, Bearl Mathews, Nehemiah (aka Fred) Mathews, Nathan Mathews and James Mathews, appellants,

appeal the denial of their bill of review in which they sought to have their case reinstated after dismissal for want of prosecution. Appellants filed suit on August 7, 1989 against Harris Methodist, Fort Worth, Tarrant-Parker County Medical Examiner's District and Lions Organ and Eye Bank, District 2E2, appellees, for the wrongful removal of their deceased brother's corneas. On September 28, 1990 the court dismissed the cause for want of prosecution. Appellants filed an equitable bill of review on March 28, 1991 that was overruled by the trial court on September 13, 1991.

Appellants raised five points of error complaining the trial court abused its discretion in denying the bill of review because: (1) and (2) appellants had no notice of the dismissal of their cause of action until the dismissal was final and

the court's plenary power to reinstate had expired, which under the circumstances, was a denial of due process under the United States and Texas Constitutions; (3) the evidence demonstrates that lack of notice of the dismissal was due to a mistake occurring in the notice process; (4) there is no evidence to support the trial court's finding that appellants' failure to timely pursue their cause of action was due to appellants' fault or negligence; and (5) the trial court's finding that appellants' failure to timely pursue their cause of action was due to appellants' fault or negligence is against the great weight and preponderance of the evidence.

The facts surrounding the events leading to the dismissal of appellants' case are essentially undisputed. The

original lawsuit was filed by a lawyer named Edmund Brown in August of 1989. Brown testified that he subsequently engaged in discovery for a number of months, including interrogatories and production requests. Brown then ceased discovery in January of 1990 because he decided to involve another lawyer on the case with more experience. He contacted other lawyers and Laurance Priddy agreed to take the case. Priddy received contractual documents regarding entering the case in January of 1991 and filed his motion to be substituted as counsel in March of 1991. Upon filing, Priddy was advised the case had been dismissed and notified Brown of this fact. Brown testified that he had no notice of the dismissal until being advised by Priddy in March of 1991. Brown also testified that when the litigation started, he

officed in the Fort Worth Club Tower but had subsequently moved to another location and had provided notice to the post office. After providing the post office with a change of address, he continued to receive mail forwarded from his previous address but never received notice that this case was on the dismissal docket or had been dismissed. Brown did not notify the court or opposing counsel of his address change because he anticipated obtaining alternate counsel. Brown makes no contention that any of the appellees did anything wrongful or fraudulent causing the dismissal.

Appellants concede in their brief that they do not meet the traditional test for an equitable bill of review set forth in Alexander v. Hagedorn, 148 Tex. 565, 226 S.W.2d 996 (Tex. 1950). Alexander

requires a party to plead and prove: (1) a meritorious defense; (2) which he was prevented from making due to the fraud, accident or mistake of the opposing party; and (3) unmixed with any fault or negligence of his own. Alexander, 226 S.W.2d at 998. It is because appellants concede appellees have not committed any fraud or wrongdoing that the Alexander test is inapplicable. Instead, appellants argue that under certain circumstances a party may be entitled to a bill of review if they can prove their failure to act within the appropriate time frame was due to some mistake on the part of official personnel. See City of Laredo v. Threadgill, 686 S.W.2d 734 (Tex.App.-San Antonio 1985, no writ); Buddy "L", Inc. v. General Trailer Co., 672 S.W.2d 541 (Tex.App.-Dallas 1984, writ ref'd

n.r.e.). Alternatively, appellants argue they may be entitled to prevail if the adverse action taken on their claim occurred without notice to them so as to deprive them of due process. See Peralta v. Heights Medical Center, Inc., 485 U.S. 80, 108 S.Ct. 896, 99 L.Ed.2d 75 (1988); Lopez v. Lopez, 757 S.W.2d 721 (Tex. 1988).

Appellants' argument alleging mistake by official personnel fails because both the Threadgrill and Buddy "L" decisions are distinguishable. Both cases actually involved some wrongdoing on the part of the opposing party as set forth in the Alexander test. The two decisions revolved around TEX. R. CIV. P. 239a which requires the party who takes a default judgment to certify the last known address of the losing party to the district clerk. In Threadgill the party

taking the default judgment never certified the address of the losing party, while in Buddy "L", the party taking the default judgment certified the incorrect address. Therefore, we find these decisions unpersuasive.

Likewise, we find that the cases cited for the proposition that appellants were deprived of their right to due process inapplicable. Peralta involved a defendant who had no service of process and had not submitted to the jurisdiction of the court; it is much more easily understood how that party was deprived of his right to due process as opposed to appellants who filed suit themselves, invoked the jurisdiction of the court and then failed to give that court notice of where they could be reached. The Lopez decision involved a defendant who was never notified of a trial setting and

consequently, failed to appear. The gravity of the lack of notice in these cases is more readily apparent than in the present case. These decisions in Peralta and Lopez involve a complete lack of notice without fault of the party who did not receive notice. In the present case it cannot be said that appellants' attorney was without fault because he knew that he had a case pending yet failed to give the district court notice of his new address.

Appellants cite additional decisions which are not on point with their due process argument because they do not involve appeals based upon due process or simply are not significantly analogous to the present case; as such we will not address those cases. Points one and two are overruled.

Appellants argue in their third point

that the uncontroverted evidence demonstrates that lack of timely notice of dismissal was due to a mistake in the notice process; however, appellants admit they could not prove whether the court did or did not mail the notice to counsel. Thus, it appears the evidence is not uncontroverted that the mistake occurred in the notice process. Moreover, appellants cite the Threadgill and Buddy "L" decisions which we discussed above and concluded were inapplicable to the disposition of this case. Appellants also argue that the notice provisions provided by the Texas Rules of Civil Procedure are ineffective to insure notice is given. However, appellants cite no authority to support this position nor do they make a valid legal argument for their position. Point three is overruled.

Points four and five are "no evidence" and "insufficient evidence" points regarding the trial court's finding that appellants' failure to timely pursue their cause of action was not free of appellants' fault or negligence. We hold that the evidence is sufficient and does support the trial court's finding that appellants were negligent because there was evidence that the case remained inactive for a least a year and appellants failed to give the district court clerk notice of their most recent mailing address. Point four and five are overruled.

The judgment of the trial court is affirmed.

/s/ DAVID F. FARRIS,
JUSTICE

PANEL A
FARRIS AND MEYERS, JJ. and Clyde R. Ashworth (Retired) (Sitting by Assignment)
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